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IN THE

Supreme Court of the United States

October Term, 1968

No. 1007

KATHLEEN MOGLIA,

Petitioner,

v.

JAMES GEOGHEGAN, PHILIP STACK, BENEDICT CIAVOLELLA, JOHN CODY, FRANK M. CAMPBELL, CHARLES J. MURPHY, FRANK L. KELLY, EDWIN E. REGNELL, JR., DUDLEY A. SAUNDERS, JOSEPH J. RYAN, WALTER SCHOFFMAN, ABRAHAM SCHWEBEL, CHARLES R. HERSEY and A. LAWRENCE GEROSA, as Trustees of Local 282—PENSION TRUST FUND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

SAMUEL J. COHEN
Attorney for Respondents
605 Third Avenue
New York, New York 10017

Of Counsel:
COHEN AND WEISS
SAMUEL J. COHEN
STANLEY M. BERMAN

INDEX

PAGE

Opinions Below 1

Statute Involved 2

Question Presented 2

Statement of the Case 2

The Local 282 Pension Trust Fund 3

John J. Moglia's Pension Application 9

Petitioner's Misstatements of Fact 11

Decisions Below 13

ARGUMENT:

POINT I—The decision below is in conformity to the statute and applicable decisions of other courts and does not present issues which require review by this Court 13

POINT II—The arguments asserted in support of the instant petition are without merit 16

POINT III—In any event, the denial of benefits to petitioner was required by the Trust Agreement and by the Rules and Regulations of the Pension Plan, and the Trustees' decision based on the Trust Agreement and the Pension Plan, is binding on petitioner 19

CONCLUSION 22

Table of Cases Cited

Ashbee v. Brunie, 50 CCH Lab. Cas. p. 32,005 (N.Y. Sup.Ct. Westchester Co. 1964) 20

Bey v. Muldoon, 217 F. Supp. 401 (E.D. Pa. 1962).... 15

Bolgar v. Lewis, 238 F. Supp. 595 (W.D. Pa. 1960).. 15

PAGE

Bono v. Kramer, 191 N.E. 2d 760 (Sup. Jud. Ct. Mass. 1963) 20

Dunbar v. Painters & Glaziers District Council, 129 F.Supp. 417 (D.C.D.C. 1955) 16

Forrish v. Kennedy, 377 Pa. 370, 105 A.2d 67 (1953) .. 20

Lewis v. Benedict Coal Corporation, 361 U.S. 459 (1960) 18

Lewis v. Mears, 297 F.2d 101 (3d Cir. 1961) *cert. den.* 369 U.S. 873 (1962) 19

Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967) 15, 18

Pasternack v. Diamond, 3 A.D.2d 422, 161 N.Y.S. 2d 277 (1st Dept. 1957) *aff'd.* 5 N.Y. 2d 770, 179 N.Y.S. 2d 864 (1958) 20

Rittenberry v. Lewis, 238 F.Supp. 506 (E.D. Tenn. 1965) 14, 17

Shelton v. King, 229 U.S. 90 (1913) 20

Szuch v. Lewis, 193 F.Supp. 831 (D.C.D.C. 1960) 20

Thomas v. Kennedy, 7 Pa. D. & C. 2d 613 (Pa. Ct. Common Pleas 1956) 20

Wagor v. Kovens Construction Corp., 382 F. 2d 813 (5th Cir. 1967) *cert. den.* 390 U.S. 952 (1968) 19

Statute Cited

Labor-Management Relations Act of 1947, as amended, Section 302, 61 Stat. 136, 29 U.S.C. Section 186 .... 2, 3, 5, 6, 14, 16

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Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit, dated November 6, 1968, is reported at 403 F. 2d 110 and at 69 LRRM 2640 and 58 CCH Lab. Cas. p. 22,771. It is reproduced in full at pages 19a-34a of the appendix annexed to the instant petition. The opinion of the United States District Court for the Southern District of New York, dated April 27, 1967, is reported at 267 F. Supp. 641 and at 65 LRRM 2402 and 55 CCH Lab. Cas.

p. 18,848. It is reproduced in full at pages 3a-18a of the appendix annexed to the instant petition and at pages 61a-81a of the appellant's appendix before the Court of Appeals. The opinion of the United States District Court for the Southern District of New York, dated March 9, 1967, is unreported. It is reproduced in full at pages 49a-50a of the appellant's appendix before the Court of Appeals.

Statute Involved

The statute involved is Section 302 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. Section 186 (hereinafter the "LMRA"). Relevant portions thereof are set out verbatim at pages 3-5 of the instant petition and at pages 3-5, *infra.*

Question Presented

Does Section 302(c)(5) of the Labor-Management Relations Act of 1947 permit a jointly administered labor-management pension fund to receive payments from employers in the absence of a written agreement, in disregard of the provisions of the Act which state that "the detailed basis on which such payments are to be made" shall be "specified in a written agreement with the employer," and on the basis of such employer payments to pay pension benefits to that employer's employees?

Statement of the Case

The complaint, filed by petitioner, sought a declaration that as the widow of John J. Moglia she is entitled to receive benefits from the Local 282 Pension Trust Fund and additional relief incidental thereto. Respondents denied benefits as being prohibited by the LMRA and the applicable trust agreement.

The Local 282 Pension Trust Fund

Respondents are the trustees (hereinafter referred to as the "Trustees") of the Local 282 Pension Trust Fund (hereinafter referred to as the "Fund") (61a-62a).* The Fund was created in 1955 by Local Union No. 282, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as the "Union"), and various employers who had entered into collective bargaining agreements with the Union (66a). The Fund was created by execution of an agreement and declaration of trust (hereinafter referred to as the "Trust Agreement") as the successor to other trust funds in which the Union had theretofore participated (67a).

The Trust Agreement authorized the Trustees to receive payments from employers who signed written collective bargaining agreements with the Union requiring such payments (29a, 67a-68a). The Trust Agreement specified that the Fund be used to provide retirement benefits for employees of contributing employers pursuant to a pension plan to be formulated by the Trustees (67a-69a). The Pension Fund is supported solely by employer contributions. Employees do not make any payments. (Art III, § 1 of the Trust Agreement annexed as Ex. "B" to the affidavit of George J. Redstone.)

Participation by the Union in the Fund required that it be maintained in strict conformity to Section 302(a) and (b) and to Section 302(c)(5) of the LMRA. Section 302(a) and (b) provide as follows:

> "(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to

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* Numerical citations followed by the letter "a" are to pages of appellant's appendix before the Court of Appeals unless otherwise noted.

any employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce;

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a)."

Violations of Section 302 are punishable by criminal penalties. Section 302(d) provides:

"Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

Section 302(c)(5) establishes limited exceptions to subsections (a) and (b) for payments to trust funds which meet specified mandatory requirements. The statutory requirements are that employers' payments be made

"... to a trust fund established by such representative, for the *sole and exclusive benefit of the employees of such employer,* and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents); PROVIDED, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or

illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) *the detailed basis on which such payments are to be made is specified in a written agreement with the employer,* and employees and employers are equally represented in the administration of such funds, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; . . ." (Emphasis added).

Pursuant to the statutory mandate, the Trust Agreement spelled out limitations upon payments into and out of the Fund. It is uncontroverted that the Trust Agreement at all times contained the limitations hereafter referred to.

Conformity with Section 302(c)(5)(B)'s requirement that "the detailed basis on which such [employer's] payments are to be made is specified in a written agreement

with the employer. . . ." was assured in the Trust Agreement by defining employers' payments as payments from employers who are required to make such payments pursuant to duly executed written collective bargaining agreements with the Union. "Employer Contributions" are defined as:

> "Payments by Employers to either of the Trust Funds created in accordance with the collective bargaining agreement." (68a)

"Employers" are defined as:

> "*Each employer who has duly executed a collective bargaining agreement with the Union and who is a signatory to this agreement,* and also any employer not presently a party to such collective bargaining agreement who hereafter executes such agreement provided that such employer satisfies the requirements for participation as established by the Trustees and agrees to be bound by the terms and provisions of this Agreement and Declaration of Trust, and becomes a party hereto." (67a) (Emphasis added.)

"Collective Bargaining Agreement" is defined as:

> "Any *written collective bargaining agreement entered into between an Employer and the Union.*" (68a) (Emphasis added.)

Section 302(c)(5)(C) requires that employers' payments made to provide pensions or annuities for *employees of such employers* be made into a separate fund from which no other benefits may be paid. Conformity to these requirements was assured by limiting benefits for which payments may be made from the Fund to benefits under a pension plan for employees covered by the necessary collective bargaining agreements between their employers and the Union.

The relevant provision of the Trust Agreement is Article V, Section 4. Section 4(a) permits the Trustees to pay

necessary expenses. Section 4(b) states the only purpose for which the Fund may be used or applied as follows:

> "(b) To pay or provide for the payment of retirement or other benefits *to eligible Employees* in accordance with the terms, provisions and conditions of the pension plan to be formulated and agreed upon hereunder." (69a) (Emphasis added.)

The term "Employees" at all times has meant only employees covered by collective bargaining agreements as defined in the Trust Agreement. The Trust Agreement defines "Employees" as:

> "All Employees covered by and who fulfill the conditions of the collective bargaining agreements in effect between the Employers and the Union." (68a)

The original Pension Plan adopted by the Trustees was carried over from the plans for the Fund's predecessor trust funds (35a-37a). It has been duly amended by the Trustees from time to time and has been distributed in the form of a printed booklet. Distribution of the booklet is made freely to eligible employees as well as to other persons who are not eligible for pensions (35a-37a, 71a). There is not and could not be any implication that the recipient of a booklet is *ipso facto* an eligible employee.

Booklets printed for distribution in 1964 and 1960 were submitted to the courts below. These booklets advised prospective retirees that eligibility for benefits depended upon the execution of written collective bargaining agreements by their employers and the Union (36a-38a). The District Court found that petitioner's husband received such booklets and was "constantly put on notice" of the requirement that he must be covered by a written collective bargaining agreement in order to receive benefits from the Fund (80a). These booklets contain the following definitions:

Employee:

> "Any person who is employed by an Employer in an employment for which the Employer is obligated by his agreement with the Union to contribute to the Pension Fund." (68a)

Employer:

> "Any employer who is obligated by his collective bargaining agreement with the Union to contribute to the Pension Trust Fund." (67a)

Collective Bargaining Agreement:

> "Any written collective bargaining agreement executed by an Employer and the Union requiring contributions to the Pension Fund." (68a)

The Trust Agreement gives the Trustees broad power to construe its provisions, and constructions made in good faith are binding on the Union and on all employers and employees. The relevant provision is Section 3 of Article V which states:

> "The Trustees shall have power to construe the provisions of this Agreement and Declaration of Trust and the terms used herein and any construction adopted by the Trustees in good faith shall be binding upon the Union, the Employees and the Employers." (68a-69a)

The District Court made detailed findings regarding the limitations of the Trust Agreement and the Pension Plan (sometimes referred to as the "Rules and Regulations") upon payments into and out of the Fund and concluded as follows:

> "The conditions imposed on the parties to the Trust Agreement Plan and the Rules and Regulations to enforce these conditions, are reasonable and fair, and drafted to adhere strictly to the statutory requirements. The background of this law and the cases interpreting it, leave no doubt that, if there is one essential element without which these funds cannot lawfully exist, it is that there be a written agreement specifying the source and amounts of money to be paid into and to be disbursed from the

> Fund. It was the absence of just such a formal agreement identifying and allocating the moneys being collected from employers by union representatives ostensibly for the employees 'Welfare Fund', which outlawed those payments. Congress recognized that the effect of such gifts, if not their very purpose, was to destroy the impartiality of the representative of the employees, whose interests often conflicted with those of the employer. *United States* v. *Ryan*, 350 U.S. 399; *I.L.A.* v. *Seatrain Lines*, 326 F.2d 916 (C.A. 2, 1964).
>
> "This is not, as plaintiff would argue, a technical provision or regulation, but the sine qua non of the payments permitted to be made." (74a-75a)

Similarly, the Court of Appeals found that "The trust agreement was written to conform with the statutory mandate . . ." (p. 23a of the appendix annexed to the instant petition) and concluded as follows:

> "The statutory requirement of a written agreement is not a minor technicality which may be dispensed with when, there being no written agreement, the acts of one party may be said to estop him from defending on that ground. A written agreement is necessary before payments may be made under the section. As compelling and as appealing as appellant's case is, the structure of the section and the Congressional intent underlying the section preclude any judicial inroads into its rigid, specific requirements." (*Id.* at pp. 29a-30a.)

John J. Moglia's Pension Application

In April, 1965, a pension application for John J. Moglia was received in the Fund office (63a-64a). Moglia listed only one employer in his application, Elmhurst Contracting Company, Inc. (hereinafter referred to as "Elmhurst") (31a, 65a).

What started as a routine processing of the application by the Fund's Administrator became an exhaustive inves-

tigation into Elmhurst's status with the Fund. This came about because the Administrator, when checking Moglia's eligibility for benefits, found no trust agreement or collective bargaining agreement executed by Elmhurst (31a, 65a).

The investigation, which included a personal appearance by Moglia and his attorney at a Trustees' meeting in October, 1965, disclosed that Elmhurst had never entered into an agreement with the Union although it had often been requested to do so by the Union (31a-33a, 65a).

The Fund Office does not investigate eligibility until an application for pension benefits is filed (39a).* Elmhurst, for reasons undisclosed, made contributions to the Fund in the absence of a collective bargaining agreement, presumably for the purpose of getting a pension for Moglia.

As soon as these facts were brought to the attention of the Trustees, they reviewed them with their legal counsel. They were advised by counsel that payment to Moglia was prohibited by the LMRA and the Trust Agreement, and that Moglia's application must be denied. They were also advised that the LMRA and the Trust Agreement prohibited them from accepting Elmhurst's payments. Accordingly the Elmhurst payments were refunded to Elmhurst. Elmhurst refused to accept the refund pending termination of the present litigation, and its payments are now being held apart from the rest of the Fund (33a-34a).**

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* The Fund Office did not make advance determinations of eligibility, considering that to be impractical because contributions were received pursuant to collective bargaining agreements covering some 7,000 employees (36a).

** On December 16, 1968, the Trustees commenced an interpleader action in the United States District Court for the Southern District of New York (Docket No. 68 Civ. 4996) against Petitioner and Elmhurst seeking judicial determination as to the proper disposition of payments made on Moglia's behalf.

It is uncontroverted that the Trustees acted in good faith with respect to Mr. Moglia's application (47a). The District Court so found (65a). The pension payments claimed by Petitioner consist of 36 installments in the amount of $200 each making a total of $7,200 (61a-62a). The payments which Elmhurst made with respect to Moglia were approximately $3,500 (33a-34a, 66a).

Petitioner's Misstatements of Fact

Petitioner in its "Statement of the Case" asserts that the Court of Appeals

> ". . . ruled that the employer's conduct and action in observing the terms of the collective bargaining agreement attached to the trust agreement by paying uniform union scale wages . . . did not constitute ratification, or any adoption, of the collective bargaining agreement by the employer." (Petition. p. 6)

There is no support in the record for the assertion that Moglia's employer paid its employees union scale wages, and the courts below made no findings to such effect. Petitioner cites pages 30a-32a of the appendix annexed to its petition in support of this assertion. At page 31a the Court of Appeals noted petitioner's contention that Elmhurst paid union scale wages and concluded that:

> "We do not agree with appellant's [petitioner's] analysis."

The Court did find that:

> "The union demanded the acceptance of a complete collective bargaining agreement along with the trust agreement. Elmhurst did not appear to be willing to accept these terms at any time." (Petition, p. 32a)

Petitioner, in argument at page 17 of its petition, expands upon the above-quoted assertion as follows:

> "It is not subject to dispute that Elmhurst, while it did not formally affix its signature to the printed form of the collective bargaining agreement promulgated by Local 282, indicated its knowledge of, and acquiescence in, the terms thereof, both by its employment of teamsters who were members of Local 282 and by its contributions to the Fund. Since Elmhurst would not have been entitled to the services of members of Local 282 unless it agreed to such terms, there is valid legal consideration for the implicit agreement between Elmhurst and Local 282 to make payments to the jointly administered Fund.
>
> This implicit agreement is fortified by a long and continued course of conduct on Elmhurst's part. From at least 1937 to April, 1965, Elmhurst employed members of Local 282 and paid them uniform union scale wages."

There is no evidence which could support any of the above-quoted statements. The undisputed allegations that Elmhurst employed Mr. Moglia, who was a member of Local 282 (5a-6a, 9a, 63a) and made payments to the Fund in the sum of approximately $3,500 on his behalf, do not show payment of the Union scale or adherence to the Union contract, which was specifically declined.

Petitioner in its "Statement of the Case" asserts that Mr. Moglia " . . . regularly received booklets, literature and *correspondence* from the Fund" (Petition, p. 7, emphasis added). The Fund office did not correspond with Mr. Moglia prior to receipt of his application (35a). The only "literature" sent him by the Fund office consisted of copies of booklets containing the pension plan (35a, 71a) which, as the District Court found, put him " . . . on notice that his employment had to be covered by a collective bargaining agreement before he could enjoy the benefits of the Fund" (80a).

Decisions Below

Upon petitioner's motion for summary judgment and respondents' cross-motion for summary judgment, the District Court denied petitioner's motion, granted respondents' cross-motion and entered judgment dismissing the complaint. The Court of Appeals affirmed.

ARGUMENT

POINT I

The decision below is in conformity to the statute and applicable decisions of other courts and does not present issues which require review by this Court.

The Court of Appeals held that petitioner is not entitled to benefits from the Fund inasmuch as her husband's employer had never entered into a written agreement specifying the detailed basis on which payments were to be made into the Fund. The Court stated:

> "Under Section 302, *any* payment made by an employer to an employee representative, and this includes trustees administering a pension trust fund, see, e.g., *United States* v. *Ryan*, 350 U.S. 299 (1956); *Sheet Metal Contractors Ass'n* v. *Sheet Metal Workers International Ass'n*, 248 F.2d 307 (9 Cir. 1957), *cert. denied*, 355 U.S. 925 (1958), *contra*, *United Marine Division, I.L.A., Local 333* v. *Essex Transportation Co.*, 216 F.2d 410 (3 Cir. 1954), and the receipt of such payments by an employee representative are absolutely forbidden unless there is a written agreement between the employer and the union specifying the basis upon which the payments are made. Thus, in the case of a legally established union pension trust fund, the only employer contributions which may be accepted by the trustees administering the fund are those contributions from employers who have a written agreement with the union as required by subsection 302 (c)(5)(B).

> Absent the written agreement, there is no valid Section 302 trust as to those employer contributions; the parties making and accepting such contributions are violating Section 302, and the intended beneficiary of the illegal employer contributions has no legal right under Section 302 to the benefits normally derived from employer contributions to the trust fund." (Petition, pp. 27a-28a.)

This holding is required by the language of the statute. Section 302(c)(5)(B) permits an employer's payments to a union trust fund only " . . . if the detailed basis on which such payments are to be made is specified in a written agreement with the employer." Section 302(c)(5) requires that a trust fund receiving such employer's payments be " . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents)." Accordingly, no benefits may be paid from a Section 302(c)(5) trust fund except to or with respect to employees of employers who are parties to the mandatory written agreement.

Every court which has considered the question raised in this case has agreed with the decision of the Court of Appeals herein.

In *Rittenberry* v. *Lewis,* 238 F. Supp. 506 (E.D. Tenn. 1965) the court dismissed an action for a pension from a Section 302 (c)(5) pension fund, referred to in the opinion as a "welfare fund." The court stated:

> "In view of the fact that it is undisputed that the plaintiff was never employed by an employer who was a *signatory* to the . . . [collective bargaining] Agreement, it is the opinion of the Court that he could not, as a matter of law, qualify as a beneficiary under the trust. This conclusion is reached upon the basis of the language contained in Section 302 of the Labor Management Relations Act, 1947, 29 U.S.C. § 186." (238 F.Supp. at p. 508.) (Emphasis added.)

In *Bolgar* v. *Lewis*, 238 F.Supp. 595 (W.D. Pa. 1960) the court dismissed an action for a pension and stated:

> "The plaintiff was not an employee at the New Century Coal Company within the term 'employee' as set forth in the Labor-Management Relations Act, 1947, Title 29 U.S.C. § 186(c)(5), *inasmuch as his employer was not a signatory* operator to the . . . [collective bargaining] Agreement and was not a contributing employer." (238 F.Supp at p. 597) (Emphasis added.)

In *Bey* v. *Muldoon*, 217 F.Supp. 401, 403 (E.D. Pa. 1962) the court stated:

> "Unless the payment by the employer falls in all respects within the provisions of § 302(c), both as to the substantive purpose and the procedural administration *and written formalization*, it violates § 302(a) and (b)." (Emphasis added.)

A similar problem was before the Third Circuit in *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (3rd Cir. 1967) in which an employer argued that oral modification of a written agreement's provisions relating to trust fund payments was valid. The court rejected this contention and stated:

> ". . . the policy of § 302(c)(5) requires that any modification of the basis of both the payments into the fund and out of the fund be made in writing." (382 F.2d at p. 443)

In view of the clear language of the statute and the unanimity of the courts in interpreting its requirements, the instant case presents no issue which should be reviewed by this Court. There being no conflict among the Circuit Courts and no manifest miscarriage of justice of national importance, it does not appear that there is any ground for granting a writ of certiorari herein.

POINT II

The arguments asserted in support of the instant petition are without merit.

It has been shown that the statute and applicable precedents fully support the decision of the Court of Appeals herein. Petitioner recognizes the overwhelming weight of authority in support of the decision below and admits that the requirement of a written agreement is mandatory.

> "Admittedly, in the absence of any agreement specifying the detailed basis on which payments are to be made into the Fund, there is no valid Section 302 trust." (Petition, p. 10)

Petitioner nevertheless attempts to explain away the statutory requirement and applicable precedent by contending that if there is a written agreement in effect between a union and some employers, payments to a union pension fund may validly be made by a non-signatory employer (Petition, p. 10). As the cases cited in Point I, *supra,* show, however, the courts have consistently held that only employers *signatory* to a written agreement may validly make payments to such a fund and only employees of such *signatory* employers may receive benefits from the fund.* This conclusion is required by Section 302.

Section 302(c)(5)(B) requires that the detailed basis on which an employer's payments to a union pension fund are to be made must be ". . . specified in a written agreement with *the employer*. . . .," and such payments must

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* Petitioner argues that her contention is supported by *Dunbar* v. *Painters & Glaziers District Council,* 129 F.Supp. 417, 423 (D.C.D.C. 1955) (Petition, p. 14). In *Dunbar* the employer was a signatory to both the applicable trust agreement and collective bargaining agreement (129 F.Supp at pp. 422-423). As the Court of Appeals found, petitioner's reliance on *Dunbar* is based on inapposite dicta (Petition, p. 30a n. 4).

be held in trust ". . . for the sole and exclusive benefit of the employees of *such employer*. . . ." (emphasis added). Petitioner would have the above italicized words read "other employers" or "any employers." The statute is not so worded.

The statutory requirement is not fulfilled with respect to one employer by reason of other employers having entered into a written agreement. The employer who is not party to the agreement is not bound by its terms and may start and stop its payments at will. No actuary could prescribe the terms under which such a pension fund could operate with such laissez-faire arrangements (79a; see, *Rittenberry* v. *Lewis, supra* at 238 F.Supp. 509). To permit such an employer to participate in a statutory pension trust fund would perpetuate the very evil which the statute was designed to prevent because there would be no detailed basis on which the employer's payments were to be made.

Petitioner contends, however, that the statute requires a written agreement only with respect to payments into the Fund and not with respect to benefits to be paid out of the Fund (Petition, p. 11).

As has been shown (see p. 14, *supra*), the statute limits payments out of the Fund to employees of employers lawfully making payments into the Fund pursuant to a written agreement. To say, as petitioner does, that the Trustees may not accept payments from an employer who is not party to a written agreement but that they must nevertheless pay benefits to such employer's employees is nonsensical. Under such an Alice-in-Wonderland interpretation of the statute the Trustees would be obliged to decline contributions while granting pensions. Payments lawfully made for the benefit of one employer's employees would be used for the benefit of employees of other employers who could not lawfully make payments to the Fund. Such use of payments is prohibited by the statutory re-

quirement that payments be held in trust for the sole and exclusive benefit of employees of contributing employers. *Cf. Lewis* v. *Benedict Coal Corporation,* 361 U.S. 459, 465 (1960) in which this Court stated:

> "Another provision [of the collective bargaining agreement] specifies that the purposes of the fund shall be all purposes 'provided for or permitted in Section 302(c).' In this way the agreement plainly declares what the statute requires, namely, that the fund shall be used 'for the sole and exclusive benefit' of the employees, their families and dependents."

Inadvertent acceptance by the Trustees of Elmhurst's contributions could not legalize such payments and could not justify retention of such payments or payment of benefits to Elmhurst's employees.

Petitioner also contends that she is entitled to pension benefits under "the principle of equitable estoppel" (Petition, pp. 15-16). The Court of Appeals held that:

> ". . . the equitable estoppel argument cannot supply the essential element of the written agreement Congress required by subsection 302(c)(5)(B)." (Petition, p. 29a)

This holding is supported by the decision of the Third Circuit in *Lewis* v. *Seanor Coal Co., supra,* in which the Court stated that ". . . there can be no estoppel against the assertion of the public policy which condemns it" (382 F.2d at p. 444).

In any event the estoppel argument is misplaced in that (1) the Fund accepted no payments from petitioner or her husband, and (2) petitioner's husband ". . . was constantly put on notice that his employment had to be covered by a collective bargaining agreement before he could enjoy the benefits of the Fund" (80a).

Petitioner contends finally that inasmuch as Elmhurst "adopted" and "ratified" the Union's collective bargain-

ing agreement, the statutory requirement of a written agreement is not applicable (Petition, pp. 16-17).

As has been shown (pp. 11-12, *supra*), petitioner's assertions that Elmhurst complied with the Union's agreement are based on misstatements of fact which are without support in the record and which are in direct conflict with the fact, as found by the Court below, that Elmhurst at all times refused to execute a Union agreement. It is well established that an employer does not become bound to a collective bargaining agreement unless he expressly agrees to do so. *Wagor* v. *Kovens Construction Corp.*, 382 F.2d 813 (5th Cir. 1967) *cert. den.* 390 U.S. 952 (1968); *Lewis* v. *Mears*, 297 F.2d 101 (3d Cir. 1961) *cert. den.* 369 U.S. 873 (1962).

POINT III

In any event, the denial of benefits to petitioner was required by the Trust Agreement and by the Rules and Regulations of the Pension Plan, and the Trustees' decision, based on the Trust Agreement and the Pension Plan, is binding on petitioner.

As has been shown (pp. 3, 8, *supra*), the Trust Agreement which the Union and various employers executed empowered the Trustees to formulate a pension plan and declared that their good faith construction of the terms and provisions of the Trust Agreement was binding on the Union, the employers and the employees. The Trust Agreement and Pension Plan at all times conditioned eligibility for benefits of a prospective retiree upon the execution of a written collective bargaining agreement between his employer and the Union (pp. 5-8, *supra*).

The courts below found these conditions to be "reasonable and fair" (74a) and "written to conform with the statutory mandate" (Petition, p. 23a). The Court of Appeals found that Moglia's pension application was rejected

on advice of counsel because of Elmhurst's admitted failure to execute the agreement required by the Trust Agreement and because of the restrictions of the LMRA (Petition, p. 25a). The Trustees alleged that their denial of Moglia's application was based *inter alia* on their good faith interpretation of the Trust Agreement and the advice of legal counsel (12a). Petitioner does not dispute these allegations (47a).

Trustees of pension funds may, within the limitations of the applicable trust agreement, establish requirements for entitlement to pensions, and their decisions made in good faith are binding on all concerned. As this Court stated in *Shelton* v. *King*, 229 U.S. 90 (1913):

> "Trustees having the power to exercise discretion will not be interfered with so long as they are acting *bona fide*. To do so would be to substitute the discretion of the court for that of the trustees." (229 U.S. at pp. 94-95)

This rule has been followed consistently in cases involving union pension funds. See, e.g., *Bono* v. *Kramer*, 191 N.E. 2d 760 (Sup. Jud. Ct. Mass. 1963); *Pasternack* v. *Diamond*, 3 A.D. 2d 422, 161 N.Y.S. 2d 277 (1st Dept. 1957) *aff'd.* 5 N.Y. 2d 770, 179 N.Y.S. 2d 864 (1958); *Szuch* v. *Lewis*, 193 F. Supp. 831 (D.C.D.C. 1960); *Ashbee* v. *Brunie*, 50 CCH Lab. Cas. p. 32,005 (N.Y. Sup. Ct. Westchester Co. 1964).

The courts will overrule good faith decisions of trustees only where the trustees have not based their decisions on substantial facts or have failed to comply with provisions of the relevant trust instrument. *Forrish* v. *Kennedy*, 377 Pa. 370, 105 A.2d 67 (1953); *Thomas* v. *Kennedy*, 7 Pa. D.&C. 2d 613 (Pa. Ct. Common Pleas 1956). As has been shown, the Trustees herein relied *inter alia* on the express requirements of the Trust Agreement and the Pension Plan, on advice of counsel, and upon the uncontroverted fact that

Elmhurst never entered into any agreement with the Union as required by the Trust Agreement and Pension Plan.

Under these circumstances the Trustees' determination must be upheld even if it could be found that the requirements of the Trust Agreement and Pension Plan are not mandated by the LMRA. Thus in *Bono* v. *Kramer, supra,* the Court stated:

> "Upon the trustees was conferred full authority to determine all questions as to eligibility for and the nature, amount and duration of benefits to be provided . . . By the terms of the trust instrument they were directed to adopt rules and regulations governing eligibility for and the nature, amount and duration of benefits . . . We will not interfere with the actions of trustees to whom has been entrusted such extensive authority except upon clear proof that they are abusing their authority and acting in perversion of the trust. *Leverett* v. *Barnwell,* 214 Mass. 105, 108. *Sylvester* v. *Newton,* 321 Mass. 416, 421-422. *Boston Safe Deposit & Trust Co.* v. *Johnson,* 326 Mass. 664, 666. Restatement 2d Trusts, § 187 (comment j in particular). The broad grant of power lodged by the terms of the trust agreement relative to the adoption of rules and regulations was undoubtedly motivated by the recognized necessity of providing for the successful operation of a complex, inclusive, and important arrangement involving many employees. Determinations under the rules and regulations by the trustees as to identity of employees entitled to benefiits will not be distributed [sic] absent a showing that the actions of the trustees were arbitrary, capricious or in bad faith." 191 N.E. 2d at pp. 763-764.

There having been no question raised herein as to the good faith of the Trustees in making the controverted determination, this alone is sufficient to require sustaining the decision of the Circuit Court and denial of the application for a writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition herein should be denied.

Respectfully submitted,

SAMUEL J. COHEN
Attorney for Respondents

Of Counsel:
COHEN and WEISS
SAMUEL J. COHEN
STANLEY M. BERMAN